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| DALE A. EDWARDS |) | |
| Claimant |) | |
| |) | |
| VS. |) | |
| |) | |
| JIM MITTEN TRUCKING, INC. |) | |
| Respondent |) | Docket No. 199,988 |
| |) | |
| AND |) | |
| |) | |
| CONTINENTAL WESTERN INS. CO. |) | |
| Insurance Carrier |) | |

Respondent and its insurance carrier request review of the April 8, 2008 Post Award Medical Award by Administrative Law Judge Thomas Klein. This is a post-award proceeding on respondent's Motion to Change Prosthetics Provider. The case has been placed on the summary docket for disposition without oral argument.

David H. Farris of Wichita, Kansas, appeared for the claimant. Nathan D. Burghart of Lawrence, Kansas, appeared for respondent and its insurance carrier.

The Board has considered the post award record and adopted the stipulations listed in the Award.

This is a post-award proceeding on respondent's Motion to Change Prosthetics Provider. Respondent requested that claimant change from his current prosthetics provider in Wichita, Kansas, to a prosthetics provider in McCook, Nebraska, which is closer to claimant's residence in Colby, Kansas. This would reduce the one way mileage claimant would travel for repair and adjustment of his prosthetic legs from approximately 259 miles

to 79 miles. Claimant argued that he has been with the same prosthetist since his amputation and does not want to change to a new prosthetist.

The Administrative Law Judge (ALJ) noted that the prosthetist respondent located in McCook, Nebraska, testified regarding the importance that a patient trust their prosthetist and that prosthetist would be uncomfortable working with someone that was reluctant to see him and was only there because of a Court Order. The ALJ denied respondent's motion to change claimant's prosthetist. The ALJ further awarded claimant's counsel attorney fees of \$1,260.

Respondent requests review of whether the ALJ erred in denying respondent's request for change of claimant's prosthetics provider as well as ordering respondent to pay \$1,260 in post award attorney fees. Respondent argues that reducing the travel mileage for claimant to see the prosthetist benefits both claimant and respondent and the proposed prosthetist is certified to work with the claimant's current prosthetic devices. Respondent further argues that the ALJ exceeded his authority by awarding attorney fees because the proceeding was not a request for additional medical treatment and a motion hearing is not specifically identified under K.S.A. 44-536 as an appropriate post-award proceeding for an award of attorney fees.

Claimant argues the ALJ's Post Award Medical Award should be affirmed. Claimant argues that claimant and his current prosthetist as well as the proposed prosthetist agree that a change is not in claimant's best interest. And that the proposed prosthetist was reluctant to be a designated provider if Court ordered. Claimant's counsel further argues that this post-award motion proceeding addressed additional medical benefits and it was proper for the ALJ to award attorney fees pursuant to K.S.A. 44-510k(c) and K.S.A. 44-536(g). Claimant's counsel also requested an award of additional attorney fees for time spent preparing for this Board review.

The issues for Board determination are whether the ALJ erred in denying respondent's motion to change claimant's prosthetic provider; whether the ALJ erred in awarding post-award attorney fees to claimant's attorney; and, whether claimant's attorney is entitled to additional fees for this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered a significant injury to his right leg and low back on February 4, 1995, when his truck was blown off the road by a strong wind. The accident resulted in an amputation of claimant's right leg above the knee and the attachment of a prosthetic leg, as well as several surgeries over a several-year time span. There have followed several

post-award proceedings regarding prosthetics for claimant's leg. Post-award proceedings have determined the type of prosthetic leg respondent should provide claimant; designation of the authorized doctor and prosthetic provider; and whether respondent should provide claimant with a back up prosthetic leg for instances when his primary prosthetic leg is not working or being repaired.

In a September 20, 2004 decision, Special Administrative Law Judge Jeff Cooper, determined that Dr. Bruner should remain claimant's authorized physician. And because Dr. Bruner had referred claimant to Ed Gormanson, a certified prosthetist, the Special Administrative Law Judge concluded Mr. Gormanson should remain the authorized prosthetic provider. The Judge reasoned that because (at that time) the claimant was located in Wichita, as are Dr. Bruner and Mr. Gormanson, there would be a saving of mileage reimbursement for respondent. And the company Mr. Gormanson worked for had locations across the country which could accommodate claimant in his employment (at that time) as a cross-country truck driver. Finally, the Judge noted there was merit in the contention that claimant had a several year history of treatment with Dr. Bruner and Mr. Gormanson.

On September 5, 2007, respondent filed a motion to change prosthetics provider. At the hearing was held on September 13, 2007, respondent requested a change to a prosthetic provider in McCook, Nebraska, which is closer to claimant's residence in Colby, Kansas. Respondent argued that claimant is now living full time in Colby, Kansas, and is no longer an over-the-road truck driver as he is going to school. Consequently, respondent argues it would be a time saving for claimant and save mileage reimbursement expenses for respondent to have claimant change prosthetic providers.

Claimant uses his Otto Bock C-Leg for every day use and he also has a Black Max with the Mauch hydraulic unit for back up and high intensity activities such as basketball. He uses a shower prosthesis or "water leg" for showering and swimming.

Claimant testified that Mr. Gormanson has designed, built, serviced, and maintained all of the prosthetic legs that he has had since his accident. Claimant testified he did not want to change prosthetic providers because he has an established relationship with Mr. Gormanson who knows claimant's needs and is well qualified in designing, preparing and maintaining his prosthetic legs. Claimant further noted that for the most part he ships his legs to Mr. Gormanson for routine maintenance which eliminates the need for a trip to Wichita.

Between June 1, 2005, and May 30, 2007, claimant had traveled to Wichita 8 times to visit Mr. Gormanson. During this two-year period claimant requested \$2,301.27 in mileage reimbursements and on two occasions the repairs were not accomplished the

same day so claimant also had motel expenses and meal expenses for which he requested reimbursement of \$219.87.¹

Ed Gormanson, board certified in orthotics and prosthetics, has fitted, serviced and maintained all of claimant's legs over the past 12 years. Mr. Gormanson testified:

Q. Now, one of the issues that we're here talking about is the distance in which Mr. Edwards would have to drive to have service or maintenance performed on his leg or legs. Would you please describe to us the method by which you are now able to service legs by mail as opposed to in person?

A. Well, depending upon the needs of Dale's legs, and I mean that in his prosthetic leg, we've -- the last two times we've done work on his C-Leg, we've done this through UPS shipping. He boxes the prosthesis up, we send a shipping label, he sends it to us, we send him a loaner. Then when his knee is repaired by Otto Bock, he ships the leg back to us and we can provide his knee back to him, and all through UPS servicing. And that's next day within the state. Even on his Black Max knee, which has a Mauch hydraulic unit, we've done the same thing, to ship him the leg after the repairs to it had been done the last time he was here in Wichita.

Q. So the necessity of him driving each and every time he has a problem is becoming less and less over time.

A. Yes.²

Mr. Gormanson testified that in order to fit and repair the Otto Bock C-Leg he had to be trained and certified by Otto Bock. Mr. Gormanson has personally fitted 18 patients with the C-Leg. Mr. Gormanson further testified that claimant would need to travel to Wichita, Kansas, from Colby, Kansas, when the socket on the C-Leg needed adjustment due to gain or loss of weight of approximately 5 pounds.

Kenneth Vyvlecka, owner of Family Orthotics and Prosthetics, has offices in Kearney and Lincoln, Nebraska as well as clinics in McCook, O'Neil and North Platte, Nebraska. Mr. Vyvlecka is certified in the Otto Bock C-leg. He further testified that he would be able to service claimant's needs for his C-Leg as well as his back up prosthetic leg. Mr. Vyvlecka has personally fitted one patient with a C-Leg and with the other prosthetist in his company an additional six patients. Mr. Vyvlecka agreed that a prosthetist who has done more C-Legs is going to do much better than somebody who has done one or two. He further recognized and understood why claimant would be reluctant to change his relationship with the prosthetist he has been with for many years. And Mr.

¹ Edwards Depo. (Oct. 19, 2007), Ex. 1.

² Gormanson Depo. (Oct. 19, 2007) at 8-9.

Vyvlecka stated he was uncomfortable with providing service for someone who is only seeing him because of a court order. Mr. Vyvlecka testified:

Q. Thank you, sir. I don't have any other questions.

A. Can I add something?

Q. Certainly.

A. My concern with working with Mr. Dale Edwards is precisely that, that he has already established a relationship with another prosthetist, and you know, in a situation where it's critical to trust your prosthetist, know and like him, if at all possible, that's what makes our business, any orthotic and prosthetic company. And, you know, patients will travel great distances to come see us if they like us. If they don't like us, they don't come back. So my only - - my only concern here is if I'm in a situation where I've got a judge ordering a man to come see me and he doesn't want to deal with me, I just - - I don't feel real comfortable with that.³

But Mr. Vyvlecka agreed that he was willing to see claimant but just concerned claimant might possibly have a bad attitude about changing prosthetists.

Both prosthetists agreed that it was necessary to develop a positive relationship with the patient in order to achieve good results. And based upon the number of C-Legs that he had fitted for patients, Mr. Gormanson has more expertise than the prosthetist respondent suggests for claimant. While having claimant change prosthetists will result in fewer miles driven there is also the possibility that a change could result in more trips until claimant and the new prosthetist develop a good working relationship and rapport. Moreover, the mileage reimbursement expense is not the only factor to be considered. Undeniably, there is a point at which the travel expenses become cost prohibitive, but based upon this record the good working relationship is more significant in achieving the statutory mandate to cure and relieve claimant from the effects of his injury. And Mr. Gormanson indicated that fewer trips are now required and expected in the future due to the ability to ship the prosthetic legs. The Board affirms the ALJ's decision denying respondent's request to change the authorized prosthetic provider.

Respondent next argues claimant's counsel is not entitled to attorney fees as its motion to change prosthetic provider does not fall within the proceedings delineated in K.S.A. 44-536(g), which authorizes an ALJ to grant an award of attorney fees.

The Workers Compensation Act provides that an attorney who represents an employee is entitled to reasonable attorney fees for services rendered after the ultimate disposition of the initial and original claim. And if those legal services result in no additional

³ Vyvlecka Depo. (Oct. 10, 2007), at 21-22.

award of disability compensation but result in an additional award of medical compensation or other benefits the director (ALJ) shall fix the proper amount of such attorney fees to be paid by the employer.

The proceeding on respondent's motion to change prosthetic provider was clearly subsequent to the ultimate disposition of the initial and original claim which was resolved by an Award dated April 11, 2003.

Respondent's argument that this request is not among those set forth in the statute that authorizes attorney fees and costs associated with post-award proceedings is misplaced. K.S.A. 44-536(g) allows for attorney fees, post-award, in certain situations.

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties **or otherwise**, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, **or other benefits**, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.⁴ (Emphasis Added)

Respondent fails to acknowledge either the phrase "or otherwise" and "or other benefits" in asserting its argument. Both phrases certainly contemplate a post-award request for a change of prosthetic provider just as the statute would contemplate a post-award request for a change of physician. If these phrases were construed to exclude such a request, there would be no incentive for attorneys to represent claimants in their efforts to retain suitable medical treatment. Such a result is contrary to the purpose of the statute.

While this provision is certainly a bitter pill for an employer or his insurer to swallow, it is necessary to assure continued representation of claimant after an

⁴ K.S.A. 44-536(g).

award. An additional benefit accrues to all concerned from this added incentive on the part of respondent to resolve post-award disputes without protracted litigation.⁵

Thus, the Board finds that the ALJ was authorized to enter an award of attorney fees for this post-award motion for a change of prosthetic provider.

Moreover, it cannot be seriously argued that a prosthetic device is not a medical benefit under the Act. K.S.A. 44-510(a), the law in effect on the date of claimant's injury required the employer to provide certain medical treatment including any "apparatus" which may be reasonably necessary to cure and relieve the employee from the effects of the injury.⁶ A prosthetic device or artificial member is an "apparatus" as defined in Kansas Administrative Regulation 51-9-2. And the designation of the prosthetist to provide future fittings, repair and adjustment of such apparatus would certainly qualify as a hearing under K.S.A. 44-536(g) for "additional medical benefits."

The ALJ awarded fees of \$1,260 and the respondent did not raise any objections to the amount other than the argument that the ALJ did not have the authority to award any fees for this post-award proceeding. The Board affirms the award of attorney fees in the amount of \$1,260.

Lastly, in claimant's brief to the Board, claimant's attorney requested additional attorney fees of \$480. The time was spent preparing for the Board review. K.S.A. 44-536(h) provides that disputes regarding attorney fees are to be addressed first by the ALJ. This would include the request for additional attorney fees in connection with this review. Accordingly, the request for additional attorney fees is remanded to the ALJ for further proceedings, if necessary, regarding the request for additional attorney fees.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated April 8, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2008.

BOARD MEMBER

⁵ Timothy A. Short, *Attorney Fees for Representing a Claimant After Final Award*, Journal of the Kansas Trial Lawyers Association, Vol. XIII, No. 2, p. 13 (1989).

⁶ The identical statutory language is now found in K.S.A. 44-510h(a).

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge